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September 15, 2025

U.S Environmental Protection Agency
Attention: Docket ID No. EPA-R08-OAR-2024-0607
Submitted via https://www.regulations.gov

To Whom It May Concern:

The Mid-Atlantic/Northeast Visibility Union (MANEVU) is submitting comments to the U.S. Environmental Protection Agency (EPA) on its proposed *Air Plan Partial Approval and Partial Disapproval; Colorado; Regional Haze Plan for the Second Implementation Period* [90 Fed. Reg. 31926 (July 16, 2025)]. These comments are the consensus views of the MANEVU non-federal members and are not intended to represent the views of the Tribal members or federal agency partners in MANEVU.

The EPA is proposing to partially approve and partially disapprove Colorado's regional haze SIP, submitted to the EPA on May 20, 2022, and supplemented on August 2, 2022, and June 23, 2023. MANEVU is commenting on two areas in the EPA's proposal. First, MANEVU disagrees with the EPA that its change in policy to now consider the Uniform Rate of Progress in determining "reasonable progress" is permissible under the statutory language of the Clean Air Act. Second, MANEVU disagrees with the EPA's proposal to disapprove enforceable SIP requirements intended to ensure that facilities having announced plans to retire do in fact retire in order to meet a state's reasonable progress goals.

1. **Use of the Uniform Rate of Progress as a non-statutory factor to override a state's statutory four-factor analysis is impermissible.**

In this proposal, the EPA notes that it "is proposing to adopt a policy whereby states that are not contributing to visibility impairment at Class I areas projected to be above the Uniform Rate of Progress are presumed to be making reasonable progress toward natural visibility conditions provided they have considered the four statutory factors." [90 Fed. Reg., at 31938, footnote 47, *citing* Air Plan Approval, West Virginia; Regional Haze Plan for the Second Implementation Period, 90 FR 16478 (April 18, 2025)] Section 169A(g)(1) of the Clean Air Act (CAA) explicitly provides that "in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements[.]" These are

commonly referred to as the "four factors" a state must apply in evaluating potential emission reductions from sources within its borders.[1]

The EPA now invokes an extra-statutory fifth factor, the Uniform Rate of Progress (URP). As framed by the EPA, this fifth factor can override a statutory four factor analysis finding that while additional requirements placed on visibility-impairing sources constitute "reasonable progress," these can be dismissed because the impacted Class I area is below the URP.

The CAA statutory text makes no mention of the URP as the deciding factor, or even a factor at all, in determining reasonable progress. This is because the URP is a regulatory, not statutory, construct of the EPA's Regional Haze Rule (RHR) promulgated after CAA section 169A(g)(1) was enacted into law.

Because the URP is a regulatory creation outside the CAA section 169A(g)(1) definition of determining reasonable progress, it is MANEVU's view that use of the URP as a factor to supersede a statutory four factor analysis is not permissible. CAA section 169A(g)(1) explicitly defines how to determine reasonable progress, and the EPA has received no authority from Congress to impose an additional overriding regulatory criterion that goes beyond the statutory factors [*see, e.g., Loper Bright Enterprises, et al. v. Raimondo, et al.* 603 U.S. 369 (2024)].

MANEVU has submitted to the EPA multiple comments on regional haze SIPs that the URP is not a "safe harbor" from having to further reduce visibility impairing emissions where reasonable. The URP is simply a straight-line tracking metric from the 2000-2004 baseline to the 2064 natural visibility goal set by the EPA in regulation.

Pursuant to the CAA, the RHR at 40 CFR 51.308(d)(1) requires states with mandatory Class I federal areas to establish goals in their implementation plans that provide for improvement in visibility on the most impaired days and ensure no degradation in visibility on the clearest days. These goals are referred to as "reasonable progress goals" or "RPGs." States with Class I areas establish the RPGs to achieve incremental improvement in visibility to meet the 2064 goal. While a state must consider the URP when establishing the reasonable progress goal, it is merely an "upper bound" measuring stick to indicate whether the rate of improvement remains on track, i.e., is not slower than what the URP represents so as not to delay achieving natural conditions by 2064.

While not clearly stated in this proposal, the EPA has previously asserted in other proposed approvals of regional haze SIPs for the second implementation period that progress below the URP would be "maximal progress" not required by the CAA.[2] To the extent the EPA would assert such a rationale in this proposal, MANEVU disagrees. The EPA's extra-statutory view of "maximal progress" undermines Congress' goal to achieve "reasonable progress." Based on MANEVU's understanding of the EPA's new policy, the EPA could dismiss requirements to achieve progress below the URP because it would be considered "maximal progress" even if "reasonable progress" as determined using the four Clean Air Act statutory factors would result in greater progress than the URP. Use of the non-statutory URP metric in this manner conflicts with the intent of Congress. Congress defined "determining reasonable progress" to be based on

[1] "A reasonable progress determination is based on applying the four factors in CAA section 169A(g)(1) to sources of visibility impairing pollutants that the state has selected to assess for controls for the second implementation period." [90 Fed. Reg., at 31929]

[2] *See, e.g.,* Proposed "Approval of Air Quality Implementation Plans; California; Regional Haze State Implementation Plan for the Second Implementation Period," 90 Fed. Reg. 25929-25944 (June 18, 2025), at 25933.

the four explicitly listed statutory factors. Any consideration of "maximal progress" must be relative to Congress' definition for determining reasonable progress using the four statutory factors. The URP metric is an extra-textual reference line that may lie above what otherwise would be determined as "reasonable progress" under the plain language of the Clean Air Act, and is therefore an impermissible reframing of "reasonable progress" from what Congress intended.

The MANEVU members have put extensive time and effort into developing RPGs during each planning period that fall well below the URP line at Class I areas within the MANEVU region. The RPGs are incorporated into the MANEVU states' regional haze SIPs, which received extensive input from the public, other states, and the federal land managers, and were ultimately approved by the EPA in its final regional haze SIP decisions. The EPA now invokes the URP as the determinative metric rather than the state-determined RPGs for their Class I areas. While neither the URP nor RPG are themselves enforceable metrics by statute, it seems incongruous that the EPA would opt for a URP untethered from the CAA and ignore the extensive work of the states in determining reasonable progress goals that by the very name seeks to align the statutory requirement of "reasonable progress" into the states' goals.

2. MANEVU disagrees with the EPA's proposal to disapprove enforceable SIP requirements for planned facility shutdowns because it intrudes upon states' SIP decisions for achieving their lowest cost emission reductions, uses *post hoc* information not available to a state at the time of its SIP submittal, and creates conflicts with the RHR consultation process.

The EPA's proposal to partially disapprove Colorado's haze SIP raises significant issues for states in their ability to capture the lowest cost emission reductions in SIPs, which has implications for all SIPs. MANEVU disagrees with the EPA's proposed disapproval because, if finalized, it will create additional difficult issues for states in developing future SIPs. The EPA's constitutional "takings" rationale and its use of *post hoc* information not available to a state at the time it submits a SIP affects all SIPs, including those for criteria air pollutants. For regional haze SIPs, the proposed disapproval action also places states in a dilemma in fulfilling their RHR consultation requirements with federal land managers (FLMs) and contradictory positions taken by the EPA.

a. MANEVU requests further explanation from the EPA on its proposal to partially disapprove Colorado's haze SIP as a constitutional "takings."

The EPA invokes a constitutional "takings" rationale to partially disapprove Colorado's haze SIP that creates deep uncertainty for states in obtaining the lowest cost emission reductions in their SIPs from planned facility shutdowns. Furthermore, the EPA's "takings" rationale has implications not just for haze SIPs, but presumably would apply to SIPs for criteria pollutants like ozone and fine particulate matter that require real, permanent, and enforceable pollution reductions in attainment demonstrations. If a state cannot include enforceable planned facility retirements in SIP attainment demonstrations, the state will need to impose additional control costs on the regulated community to achieve additional enforceable emission reductions that would otherwise be unnecessary.

The EPA characterizes Colorado's SIP as "forcing" closures of electric generating units (EGUs). However, the factual situation based on our understanding of the SIP record is that the EGU owner/operators had previously announced retirement plans, and these plans had been accounted

for in Colorado's state utility and energy planning decisions. It also appears that only one EGU owner/operator indicated it had changed retirement plans after the SIP submittal, while the other announced retirement plans had not changed. If the EPA is applying its constitutional "takings" argument to all EGUs in Colorado's haze SIP having retirement plans, MANEVU requests further explanation from the EPA on why it considers these voluntary EGU retirement plans as "forced."

An owner/operator could also make plans to retire a facility for market-based economic reasons, but could then seek "takings" compensation from a state if the state sought to make the retirement an enforceable SIP element. In essence, an owner/operator is given the incentive to seek "takings" compensation for market-driven decisions it would make anyway. MANEVU requests additional guidance from the EPA on how to address these situations.

MANEVU notes that in the courts, the typical judicial review approach is to seek to resolve issues through other available legal avenues before considering constitutional claims. MANEVU also notes that while the EPA proposes to partially disapprove Colorado's haze SIP, it indicates that no SIP revisions are needed despite the partial disapproval. This is an unusual approach considering the size of the pollution sources involved. MANEVU suggests two possible alternatives that would provide states with the opportunity to revise their SIPs rather than the EPA partially disapproving on a "takings" rationale with no opportunity for states to address. One option is to grant a state a conditional approval coupled with a set time period, such as one year, to revise its SIP submittal in response to the EPA's concerns. This would give the state an opportunity to address issues with a facility owner/operator, such as developing a new four-factor analysis, if its previously announced shutdown plans changed after the initial SIP submittal. A second option is to require the states to address later-arising issues as part of their required 5-year progress reports, and adjust their SIPs as necessary to reasonably accommodate changes in shutdown plans. States and others may have additional ideas for options to address these situations, and MANEVU recommends the EPA request those ideas through proposed guidance.

b. MANEVU requests guidance from the EPA on how it incorporates information arising after a haze SIP submittal as the basis of a SIP disapproval in light of recent appellate court decisions rejecting the EPA's use of post hoc information as the basis of SIP disapprovals.

The EPA's proposal to partially disapprove Colorado's haze SIP relies on *post hoc* information not available to Colorado at the time of its submission, which creates confusion for all states in developing future SIPs. MANEVU notes that two recent appellate court decisions vacated the EPA's disapprovals of "good neighbor SIPs" where the disapprovals were based in part on information used by the EPA not available to the states prior to their SIP submittals.[3]

MANEVU is also troubled by the EPA's proposal to partially disapprove Colorado's haze SIP because as a policy matter, it undermines the states' statutorily required four-factor analysis under the Clean Air Act. A facility owner/operator could tell a state it plans to shutdown during

[3] *Commonwealth of Ky. v. U.S. EPA*, No. 23-3216/3225 (6th Cir. Dec. 6, 2024) (vacating the EPA's disapproval of Kentucky's good neighbor SIP in part for the EPA's use of newer modeling information not available at the time of Kentucky's SIP submission); *State of Texas v. U.S. EPA*, 23-60069 (5th Cir. March 25, 2025) (vacating the EPA's disapproval of Mississippi's good neighbor SIP for relying on new data after SIP submittal "in an outcome-determinative manner").

the development of a state's haze SIP. The state would then take that into account under the "remaining useful life of any existing source" factor in the statutory four-factor analysis. If a four-factor analysis concludes that additional pollution controls are not reasonable in light of the announced remaining useful life of the facility, the facility would not be required to install additional measures. If an owner/operator then at a later date decides not to shutdown the facility, it will have avoided requirements to install reasonable controls.

The EPA additionally asserts that Colorado inadequately considered "maintaining grid reliability and utilities' ability to meet energy demand," citing two *post hoc* items appearing after Colorado's SIP submittal,[4] neither of which appear to contain information specific to Colorado that would inform its SIP development beyond Colorado's state utility and energy planning processes that it already undertakes.[5] We request that the EPA more fully explain its statutory authority and *post hoc* state-specific analysis used to substitute its judgment over that of a state's generation resource planning process, an area reserved to the states under the Federal Power Act, 16 U.S.C. section 824(b)(1).[6]

In light of these new issues raised by the EPA's proposed partial disapproval of Colorado's haze SIP, MANEVU seeks explanation and guidance from the EPA. To the extent the EPA's basis for partial disapproval is based on new national policies found in existing statutory authority uniformly applied to all SIPs, states and the public should have the opportunity to comment on the new policies in the SIP context. This will also help clarify the EPA's approach in substituting its national policy goals for state-specific SIP decisions, ensuring consistency with recent Supreme Court decisions on appellate court jurisdiction in this area.[7]

MANEVU notes that the Western Governors' Association (WGA), of which Colorado is a member, has adopted Policy Resolution 25-02[8] that MANEVU believes is consistent with our request for state-specific clarity and guidance from the EPA. Specific requests from WGA Resolution 25-02 include [as numbered in the Resolution]:

> 2. EPA should recognize state authority under the CAA and accord states sufficient flexibility to create air quality and emissions programs tailored to individual state needs, industries, and economies. In its timely review of state plans, EPA should focus on the circumstances facing the individual state. EPA should not reject reasonable state policy choices based solely on national consistency, fear of being legally challenged, or on concerns that such choices might not be appropriate for all states.

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[4] Executive Order 14241, The White House, (April 8, 2025); North American Electric Reliability Corporation, "2024 Long-Term Reliability Assessment," (December 2024).

[5] We note that Colorado's SIP submission indicates that one EGU retirement slated for December 31, 2039 (Comanche Unit 3) is subject to approval by Colorado Public Utilities Commission. *See* Colorado Air Pollution Control Division, "Colorado Visibility and Regional Haze State Implementation Plan for the Twelve Mandatory Class I Federal Areas in Colorado," adopted by the Colorado Air Quality Control Commission on December 17, 2021, Figure 5-2.

[6] *See* Motion to Intervene and Protective Request for Rehearing by the Attorneys General of Maryland, Washington, Illinois, Michigan, Minnesota, Arizona, Colorado, Connecticut, and New York, *In re: Resource Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid, July 2025*, submitted to the U.S. Department of Energy (August 6, 2025).

[7] *U.S. EPA v. Calumet Shreveport Refining, L.L.C.*, 605 U.S. ____ (June 18, 2025, No. 23-1229); *State of Oklahoma v. U.S. EPA*, 605 U.S. ___ (June 18, 2025, No. No. 23-1067).

[8] Western Governors' Association Policy Resolution 25-02, "Air Quality Protection and Management" (December 9, 2024), https://westgov.org/images/files/WGA-PR-2025-02-Air-Quality_1.pdf.

3. Federal agencies should communicate, consult, and engage early and often with Governors and state air quality agencies as co-regulators. EPA should work with states to clarify responsibilities and procedures to improve coordination and consultation among state agencies, EPA, and federal land managers.

4. EPA rules and guidance should be clear, prompt, and supported by best available science and data. EPA should consult with states throughout the drafting process before a potential rule, rule revision, policy or guidance becomes public. EPA should also provide states with timely implementation guidance when new and revised regulations or standards are published.

    c. MANEVU requests that the EPA provide guidance to states on addressing the RHR consultation requirements where FLM comments conflict with the EPA's view on incorporating enforceable requirements in the states' haze SIPs for facilities with announced shutdown plans.

MANEVU in past comments to states during their RHR consultation processes has requested that where a state is indicating it will achieve reductions in haze-forming pollution through facility planned shutdowns or other changes, such as fuel-switching or operational changes, the states should make those shutdowns or other changes enforceable.[9] The MANEVU states themselves have received similar comments from FLMs on their draft haze SIPs in keeping with

[9] MANEVU comments to the Missouri Department of Natural Resources, Air Quality Planning Section, on "Missouri Regional Haze Plan for the Second Planning Period, April 28, 2022," (May 3, 2022),. available at https://otcair.org/MANEVU/Upload/Publication/Correspondence/manevu-comments-on-missouri-proposed-haze-sip-20220503.pdf; MANEVU comments to the West Virginia Department of Environmental Protection, Division of Air Quality, on "West Virginia Regional Haze State Implementation Plan (SIP) Revision for the Second Planning Period, December 2021" (January 10, 2022), available at https://otcair.org/MANEVU/Upload/Publication/Correspondence/MANE-VU%20Final%20Comments%20on%20WV%20RH%20SIP%2020220110.pdf; MANEVU comments to the Tennessee Department of Environment and Conservation, Division of Air Pollution Control, on "Tennessee Regional Haze State Implementation Plan, Pre-Hearing Draft, October 21, 2021," (December 1, 2021), available at https://otcair.org/MANEVU/Upload/Publication/Correspondence/MANE-VU_Comments_TN_RH_SIP_20211201.pdf; MANEVU comments to the Indiana Department of Environmental Management, Office of Air Quality, on "Draft Indiana Regional Haze State Implementation Plan for the Second Implementation Period," (November 5, 2021), available at https://otcair.org/MANEVU/Upload/Publication/Correspondence/MANE-VU_Comments_IDEM_RH_SIP_20211105.pdf; MANEVU comments to the North Carolina Department of Environmental Quality, Division of Air Quality, on "Pre-hearing draft of the Regional Haze State Implementation Plan (SIP) for North Carolina Class I Areas for the Second Planning Period (2019 – 2028)," (October 12, 2021), available at https://otcair.org/MANEVU/Upload/Publication/Correspondence/MANE-VU_Comments_NC_RH_SIP_20211012%20final.pdf; MANEVU comments to the Michigan Department of Environment, Great Lakes, and Energy Air Quality Division, SIP Development Unit, on "Proposed SIP Revision: State Implementation Plan Submittal for Regional Haze Second Planning Period," (June 28, 2021), available at https://otcair.org/MANEVU/Upload/Publication/Correspondence/MI_RH_SIP_MANE-VU_Comments_final_20210628.pdf; MANEVU comments to the Ohio Environmental Protection Agency, DAPC, on "DRAFT Regional Haze State Implementation Plan for the Second Implementation Period," (June 28, 2021), available at https://otcair.org/MANEVU/Upload/Publication/Correspondence/OH_RH_SIP_MANE-VU_Comments_final_20210628.pdf; MANEVU comments to the Texas Commission on Environmental Quality, Air Quality Division, on "2021 Regional Haze SIP Revision," (January 6, 2021), available at https://otcair.org/MANEVU/Upload/Publication/Correspondence/TX_RH_SIP_MANE-VU_Comments_final_20210106.pdf.

the RHR consultation requirements. For example, the National Park Service and U.S. Forest Service provided the comment below during New Jersey's haze SIP consultation process:

> New Jersey should consider adding references and/or footnotes regarding the permanent shut down of the BL England [EGU] facility, in particular references to the applicable Administrative Consent Orders, in Section 7.2. It is recommended that New Jersey cite regulations enforcing New Jersey actions in response to two of the Mid-Atlantic/Northeast Visibility Union (MANE-VU) Asks: the BL England shut down and the permits, enforceable agreements and/or rules to lock in lower emissions rates for operations that have switched to lower emitting fuels.[10]

New Jersey incorporated the FLM-requested references in its haze SIP, which the EPA approved.[11]

Similarly, the National Park Service commented on Colorado's draft haze SIP during the state's RHR consultation process with the following:

> The Colorado analyses assumed equipment lifetimes of 20 years in the various analyses. In general, we recommend these assumptions are too low. In our experience reviewing similar facilities in other states, very old compressor turbine/RICE sources (70+ years old), coal boilers and cement kilns do not anticipate ceasing operation before the 25-30-year lifetime of the control equipment. The [EPA Control Cost Manual] recommends longer equipment lifetimes are assumed in cost analyses for many of the equipment types considered for the Colorado facilities. [citation omitted] Unless Colorado requires federally enforceable shutdown dates for these units as part of Colorado's RH SIP, we recommend that longer equipment lifetimes should be assumed in the analyses.[12]

The EPA previously approved in New Jersey's haze SIP what it is now proposing to disapprove in Colorado's submission. As requested previously, MANEVU asks that the EPA provide states with the opportunity to comment on the EPA's apparent change in policy. MANEVU also seeks guidance from the EPA on how states should reconcile comments from the FLMs during the required RHR consultation process that conflict with the EPA's new policy.

3. Conclusions and requests for more information.

For the above reasons, MANEVU disagrees with the EPA's use of the URP as a factor in finding a state has "presumptively demonstrated" reasonable progress in its haze SIP. MANEVU also disagrees with the EPA's proposed partial disapproval of Colorado's haze SIP submittal in light of its implications for states that seek to ensure their emission sources are not unnecessarily over-regulated at higher cost. The EPA's partial disapproval proposal also creates opportunities for sources to avoid installing reasonable controls and seek compensation for business decisions made independent of SIP requirements, uses *post hoc* information not available to the states at the time of SIP submittal, and conflicts with past FLM comments on state haze SIPs.

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[10] New Jersey Department of Environmental Protection, Final Regional Haze SIP Appendix K, Public Participation, (August 22, 2019), p. 2, https://dep.nj.gov/wp-content/uploads/airplanning/RegionalHazeSIP2020-AppendixK.pdf.
[11] 88 Fed. Reg. 78650 (November 16, 2023).
[12] NPS Air Resources Division (ARD) and Intermountain Region (IMR) Air Staff Review of the Colorado Department of Public Health and Environment – Air Pollution Control Division's (CDPHE-APCD) Regional Haze Four-Factor Analysis – Initial Control Determinations (June 24, 2021), p. 5.

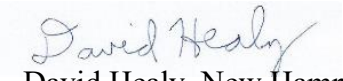
Should the EPA finalize these proposed actions for its stated reasons, MANEVU requests that the EPA propose guidance to the states on how these changes will affect SIP planning so that states have an opportunity to provide input. The guidance should address the following areas, and any other items states may raise in light of the EPA's new approach in evaluating SIPs.

1. Describe the EPA's legal justification in greater detail for the use of the URP as a new non-statutory factor that may override the CAA's required 4-factor reasonable progress determination.
2. Explain what statutory authority the EPA has for substituting its judgment on electric generation planning over state decisions developed through their well-established resource planning processes, an area of responsibility typically reserved for the states under the Federal Power Act.
3. Describe what additional information beyond long-established state utility commission and energy agency planning processes the EPA seeks from states in order to obtain enforceable SIP reductions from planned EGU shutdowns.
4. Clarify if the EPA considers all SIP measures seeking to make enforceable announced voluntary retirements as "forced" shutdowns, or only those facilities that change plans after a SIP is submitted.
5. Describe how states should address "the remaining useful life of any existing source" factor in the statutory four-factor reasonable progress analysis for haze SIPs where a facility has announced plans to retire but states cannot recognize those plans as an enforceable SIP measure.
6. For SIP attainment demonstrations, explain how the EPA envisions states addressing in their SIPs the excess reductions they will need to obtain for demonstrating attainment if they cannot incorporate enforceable reductions from an owner/operator's decision to voluntarily shutdown.
7. Clarify how the EPA plans to use *post hoc* information arising after a SIP submittal in light of recent circuit court decisions on prior EPA SIP disapprovals.
8. Describe how states should address situations where the EPA's policies conflict with FLM comments that states have previously received as part of their required FLM consultation process.

Thank you for your consideration of MANEVU's comments and requests.

Sincerely,

Sharon Davis, New Jersey Department of Environmental Protection



David Healy, New Hampshire Department of Environmental Services
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cc: MANEVU Directors
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